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KOVALAN RAJOO v. HANIF MUHAMAD PAUZI

HIGH COURT MALAYA, ALOR SETAR
CHOO KAH SING JC
[CIVIL APPEAL NO: 12B-NCVC-20-04-2015]
10 NOVEMBER 2015

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DAMAGES: *Quantum – Appeal against quantum – Fracture of pubic tubercle – Award of damages based on itemised injuries in each segment of bones surrounding pelvis – Whether damages awarded excessive – Whether pelvic injuries ought to be considered as one – Whether global sum should be awarded*

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The motorcycle that the respondent ('the plaintiff') was riding collided with the motorcar the appellant ('the defendant') was driving. As a result of the accident, the plaintiff suffered, *inter alia*, fracture on the pubic tubercle. The Sessions Court Judge ('SCJ'), in holding the defendant fully responsible for the accident, had itemised the injuries in each segment of the bones surrounding the pelvis and awarded RM352,000 to the plaintiff as general damages. The defendant argued that the amount of damages awarded was excessive and appealed against the quantum. It was the defendant's contention that the plaintiff's pelvic injuries ought to be considered as one and a global sum should be awarded.

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Held (dismissing appeal with costs):

(1) The appellate court should not interfere with the exercise of discretion by the trial judge unless the award of damages was seriously wrong that it was plainly unreasonable. A preference or an opinion of what would be a fair amount for an award of damages which was not in sync with the trial judge's award of damages could not be a ground for an appellate court to reverse the trial judge's decision for the award of damages granted. (paras 16 & 26)

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(2) Even though the injured parts were connected and surrounding the pelvis bone, a global sum should not be awarded. They are not the same kind of injuries even though they occurred within the same areas. If a global sum was awarded, it would set an unhealthy precedent for similar injuries around the pelvis bone. Each part of the pelvis bone should be considered as distinct to enable the trial judge determine the appropriate award of damages for each part. The degree of damage must also be taken into consideration. (paras 19, 21 & 22)

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Case(s) referred to:

Chong Chee Khong & Anor v. Ng Yeow Hin [1997] 4 CLJ Supp 17 HC ***(refd)***
Dararlala David Awai v. Andy Christopher Enjat & Another [2014] PIR 124 ***(refd)***
Hazleen Md Salleh & Ors v. Wong Chee Keong & Anor [2010] 1 PIR 50 ***(refd)***
Mahmod Kailan v. Goh Seng Choon & Anor [1976] 1 LNS 68 FC ***(refd)***
Selvarajan Arumugam v. Tan Seow Peng & Anor [2013] 2 PIR 9 ***(refd)***

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Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***
Yang Salbiah & Anor v. Jamil Harun [1981] 1 LNS 106 FC ***(refd)***
Yii Chee Wee & Another v. Boon Chin Fall [2013] 2 PIR 67 ***(refd)***
Yogeswari Arumugam v. Chan Chim Chan @ Cham Chuan Chang [2013] 1 PIR 36 ***(refd)***

For the appellant - Noor Haliza Ishak; M/s Matthew Thomas & Co
For the respondent - HT Tiong; M/s NM Tiong & Co

[Appeal from Sessions Court; Civil Suit No: A53KJ-115-06-2014]

Reported by Najib Tamby

JUDGMENT

Choo Kah Sing JC:

Introduction

[1] For ease of reference, the appellant shall be referred to as "the defendant", and the respondent shall be referred to as "the plaintiff" in this judgment.

[2] On 5 October 2015, I dismissed the defendant's appeal against the decision of the Sessions Court Judge (SCJ) dated 2 April 2015. Essentially, the defendant's appeal was only on the issue of quantum, particularly in relation to the following items:

No.	Injuries	Amount Awarded
(i)	Fracture left sacral	RM25,000
(ii)	Symphysis pubic diastasis	RM40,000
(iii)	Chip facture left pubic tubercle	RM20,000
(iv)	Multi ligaments injury left knee with left popliteal artery injury (together with left posterior cruciate ligament...)	RM35,000
(v)	Chip facture left femoral condyle, incomplete facture medial cortex	RM40,000
(vi)	Facture left fibula neck	RM13,000
(vii)	Right brachial plexus injury	RM45,000
(viii)	Scar: parut-parut	RM20,000
(ix)	Scar: skin grafting	RM25,000
(x)	Intraperitoneal injury and de- functioning colostomy	RM50,000

(collectively hereinafter referred to as "the said damages")
Table A

[3] The defendant's counsel submitted that the amounts awarded for the said damages were excessive and not in accordance with the trend of awards. I did not agree with the defendant's counsel. The defendant was not satisfied with my decision and has filed an appeal to the Court of Appeal. Below are the reasons for my decision.

Brief Facts

[4] On 27 October 2011, the plaintiff was riding his motorcycle, bearing registration number KCL 5597, along Alor Setar-Butterworth Highway, Gurun Kedah (hereinafter referred to as "the said highway").

[5] The plaintiff came from Pekan Gurun and was on his way home to Taman Murni. When the plaintiff reached kilometre 40 of the said highway, the defendant, driving a motor car bearing registration number KAB 7529, collided on to the plaintiff. The defendant was coming from the opposite direction of the plaintiff. It was a head on collision between the plaintiff and the defendant. The plaintiff suffered multiple injuries as a result of the accident. The defendant was not injured.

[6] Both parties agreed that the accident occurred on the plaintiff's side of the road. The defendant was issued a compound and fined RM3,000 by the traffic authority. Based on the oral evidence from the parties' witnesses and documentary evidence adduced in court, the learned SCJ found that the defendant was fully responsible for the plaintiff's injuries.

[7] The SCJ awarded general damages of RM352,000 for various heads of injuries, including the said damages. The SCJ also awarded the plaintiff special damages, interest and costs for the action. The defendant was not satisfied with the said damages awarded to the plaintiff. The defendant believed the amounts of the said damages were manifestly excessive.

The Defendant's Submission

[8] Basically, the defendant's counsel submitted that the SCJ should have awarded the said damages in accordance with the sums (in italic) as suggested in the last column below:

No.	Injuries	Amount Awarded	Defendant suggested for:
(i)	Fracture left sacral	RM25,000	A global sum for Items (i), (ii) and (iii) - *RM30,000*
(ii)	Symphysis pubic diastasis	RM40,000	
(iii)	Chip facture left pubic tubercle	RM20,000	
(iv)	Multi ligaments injury left knee with left popliteal artery injury (together with left posterior cruciate ligament ...)	RM35,000	*RM25,000*

(v)	Chip facture left femoral condyle, incomplete facture medial cortex	RM40,000	*RM30,000*
(vi)	Facture left fibula neck	RM13,000	-10% = *RM11,700*
(vii)	Right brachial plexus injury	RM45,000	*RM30,000*
(viii)	Scar: parut-parut	RM20,000	Both viii) and ix) *RM15,000*
(ix)	Scar: skin grafting	RM25,000	
(x)	Intraperitoneal injury and defunctioning colostomy	RM50,000	*RM20,000*
	Total	RM313,000	*RM161,700*

Table B

The Findings Of This Court

[9] It is trite law that an appellate court is slow to disturb an award for damages granted by the trial court, unless the trial judge had acted on a wrong principle of law or had misapprehended the evidence and facts or had awarded a sum which is manifestly inadequate or excessive.

[10] I am guided by the Federal Court decision in the case of *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323, where Andul Hamid Omar CJ held as follows:

> Now, in an appeal on quantum of damages, it is essential in order to come to a conclusion to bear in mind certain principles which are well established. The appeal court is slow, indeed, disinclined to interfere with the Judge's finding merely because the appeal Court thinks that if the case had been before it in the first instance a lesser sum would have been awarded. Azmi CJ (Malaya) (as he then was) giving the Judgment of the Federal Court in *Topaiwah v. Salleh* [1968] 1 MLJ 284 said that:
>
> > In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted on some wrong principles of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled (see *Flint v. Lovell* [1935] 1 KB 354).
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> In *Greenfield v. London and North Eastern Railway Company* [1945] KB, Mac Kinnon LJ had this to say:
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> > The principle on which the Court of Appeal reviews the assessment of damages, whether too high or too low, is not because the Court of Appeal might have given rather more or rather less, but only (1) if the Judge has omitted some relevant consideration or admitted some irrelevant consideration, or (2) if the amount is so excessive, or insufficient, as to be plainly unreasonable.

A Lord Evershed MR in *Wilson v. Pillay* [1957] 3 All ER 525 at 526 emphasised that:

> ... interfere by this Court with an award of damages by the trial Judge must be a rare thing, and may I say that it should be perhaps oven rarer in relatively small cases tried in the County Court. No one would suggest that, because this Court thought that the damages, small in any case, were rather on the low side, this Court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one.

We would also refer to *Elliot v. Preston* [1971] 2 Lloyds Rep 328 where Salmon LJ had this to say:

> Before we can interfere, there has to be (in the phrase which is hallowed, but has now I think a rather archaic ring) a wholly erroneous estimate of damage. That I have always regarded as meaning that a Court has to be satisfied that it is very wrong. If you are satisfied that it is wrong, and seriously wrong, then not only is this Court entitled to interfere, but it is its duty to interfere. I would agree ... that you cannot say, if it is wrong by such and such a per cent, you do interfere, and if it is not you do not, I think each case stands by itself, and a great deal depends upon the amount of the award.

The principle that should guide this Court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the Judge to consider some relevant materials, or he had admitted for purpose of assessment some irrelevant considerations. If the Court is satisfied or convinced that the Judge has acted upon wrong principle of law then it is justified in reversing; indeed, it is a duty to reverse the finding of the trial judge.

[11] An earlier Federal Court's decision in the case of *Mahmod Bin Kailan v. Goh Seng Choon & Anor* [1976] 1 LNS 68, wherein His Lordship Suffian LP held as follows:

> The principle upon which we can interfere with the award has been stated by Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601, 616-617 as follows:
>
> > Where the award is that of the Judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate Court is particularly slow to reverse the trial Judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases,

> but a good general guide is given by Greer LJ in *Flint v. Lovell*. In effect the Court, before it interferes with an award of damages, should be satisfied that the Judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate Court is to interfere, whether on the ground of excess or insufficiency.

[12] In light of the above Federal Court's decisions, the legal proposition in an appeal against an award for damages could be surmised as follows:

(i) The onus on an appellant is a heavy one;

(ii) The appellant must satisfy the appellate court:

(a) That the trial judge acted on a wrong principle of law; or

(b) The damages awarded is so extremely high or low to make it an entirely an erroneous estimate of damages, in other words, it is plainly unreasonable; or

(c) The trial judge omitted to consider some relevant materials or admitted some irrelevant considerations, resulting in the award of damages being wholly inaccurate. In other words, if the trial judge had considered the relevant materials or did not take into consideration the irrelevant considerations, the trial judge would have come to an award entirely different from the one he had awarded.

(iii) The award of damages in each case stands by itself;

(iv) It is not enough for the appellant to show there is a balance of opinion or preference.

[13] The mere fact that one judge's award is different from another judge's award does not form as a basis for an appellate court to disturb the award of damages by the lower court. The award of damages in every case stands by itself - it depends on the age, sex and degree of injury and the chances and degree of recovery as well. Occasionally, it also depends on the available options for medical treatments.

[14] A compendium is merely a compilation of information on court awards of damages. The information in the compendium may indicate the trend of the award of damages for similar injuries. Having said that, an award of damages outside the range found in the compendium is not necessarily a reason for the appellate court to disturb the award of damages. The appellate court will only disturb the trial judge's award of damages if and only if the trial judge's award of damages is so very wrong or seriously wrong that no reasonable judge would have awarded the amount for the same set of facts.

[15] An award of damages leaning to one end of the scale found in a compendium does not tantamount to an award that is very wrong or seriously wrong; it is merely the exercise of the trial judge's discretion. This does not form a basis for an appellate court to interfere with the discretion of the trial judge. The compendium's scale should not be used as a basis for an appeal against the exercise of the judge's discretion in deciding the award for damages.

[16] The appellate court should not interfere with the exercise of discretion by the trial judge unless the award of damages is so very wrong or seriously wrong that it is plainly unreasonable.

[17] Premised on the above propositions, I now turn to the suggested amounts for damages sought by the defendant's counsel. A comparison table is prepared below to reflect the awarded amounts and the amounts that were suggested by the defendant's counsel:

No.	Injuries	Amount Awarded	Defendant suggested for:	The difference
(i)	Fracture left sacral	RM25,000	A global sum for Items (i), (ii) and (iii) - RM30, 000	RM55,000
(ii)	Symphysis pubic diastasis	RM40,000		
(iii)	Chip facture left pubic tubercle	RM20,000		
(iv)	Multi ligaments injury left knee with left popliteal artery injury (together with left posterior cruciate ligament...)	RM35,000	RM25,000	RM10,000
(v)	Chip facture left femoral condyle, incomplete facture medial cortex	RM40,000	RM30,000	RM10,000
(vi)	Facture left fibula neck	RM13,000	-10% = RM11,700	RM1,300
(vii)	Right brachial plexus injury	RM45,000	RM30,000	RM15,000

(viii)	Scar: parut-parut	RM20,000	Both viii) and RM15,000	RM30,000
(ix)	Scar: skin grafting	RM25,000		
(x)	Intraperitoneal injury and defunctioning colostomy	RM50,000	RM20,000	RM30,000
	Total	RM313,000	RM161,700	RM151,300

Table C

[18] I shall first deal with items (i), (ii) and (iii) together. The defendant's counsel submitted that the three items should be considered together and that a global award should be given because the injuries were from the same part of the body. The case *Chong Chee Khong & Anor v. Ng Yeow Hin* [1997] 4 CLJ Supp 17; [1997] 5 MLJ 786 was cited by the defendant's counsel, but it did not support the argument of the defendant's counsel that the injuries in this case ought to be considered as one and that a global sum ought to be awarded.

[19] The SCJ had meticulously itemised the injuries in each segment of the bones surrounding the pelvis. The fractured left pubic tubercle is located distinctly from the fractured left sacral, although they form part of the whole pelvis bone. The injury of symphysis pubic diastasis simply means separation of normally joined pubic bones, which in this case the area near the left pubic tubercle (see p. 76 of the Rekod Rayuan where it stated "there is slight widening of the pubic symphysis"). Although all the injured parts are connected and surrounding the pelvis bone, but I am not inclined to accept the contention of the defendant's counsel that a global sum should be awarded. Each award for the injuries granted by the SCJ was supported by independent case law.

[20] For injury (i), the SCJ relied on the case of *Dararlala anak David Awai v. Andy Anak Christopher Enjat & Another* [2014] PIR 124, where the court therein awarded RM25,000. For injury (ii), the SCJ relied on the case of *Yii Chee Wee & Another v. Boon Chin Fall* [2013] 2 PIR 67, where the court therein awarded RM40,000. For injury (iii), the SCJ relied on *Hazleen bt Md Salleh & 2 Ors v. Wong Chee Keong & Anor* [2010] 1 PIR 50, where the court therein awarded RM20,000.

[21] The defendant's counsel cited the cases of *Selvarajan a/l Arumugam v. Tan Seow Peng & Anor* [2013] 2 PIR [9] and *Yogeswari a/p Arumugam v. Chan Chim Chan @ Cham Chuan Chang* [2013] 1 PIR [36]. Both of these cases involved a fractured pubic rami (or *ramus*), whereas, in the present case, the plaintiff suffered fracture on the pubic tubercle. Although pubic ramus and pubic tubercle are adjacent, they are distinct in terms of their positions. The injury of symphysis pubic diastasis (diastasis symphysis pubis) is a distinct injury from the fractured left sacral and left pubic tubercle. They are not the

A same kind of injury although they occur within the same areas. Just because the injuries happened to be in the same part of the pelvis bone, that could not be the reason to grant a global sum for an award of damages.

[22] If a global sum is awarded in this instant case, it sets an unhealthy precedent for similar injuries around the pelvis bone. Each part of the pelvis B bone should be considered as distinct to enable the trial judge to determine the appropriate award for damages for each part. The degree of damage must also be taken into consideration.

[23] A global award should be discouraged. I refer to the judgment of Raja C Azlan Shah CJ in the case of *Yang Salbiah & Anor v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292, at 293, where His Lordship says:

> A global award has the distinct advantage of covering a multitude of sins. It does not show where or how the judge had erred on the side of over generosity or on the side of parsimony. But there is at least one good reason why a global sum should be discouraged.

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[24] With regard to the injuries in items (iv) to (ix), I have considered the reasoning of the SCJ in his judgment in coming to the award of damages granted (pp. 19- 22 of the Rekod Rayuan Tambahan). I could not find the learned SCJ had acted on a wrong principle of law, neither could I find the awards of damages are extremely high or low to make them entirely E erroneous estimates of damages, in other words plainly unreasonable. In fact, each award of damages was supported by case law. The award of the said damages could not in any manner be considered as entirely erroneous estimate of damages.

F **[25]** The defendant's counsel in the appeal relied mostly on the Revised Compendium of Personal Injury Awards (complied by the Bar Council Malaysia dated 11 October 2013) as her basis for the proposed amounts for the various heads of injury. The defendant's counsel submitted that the proposed amounts were considered as the "fair amount" to be granted for the G damage.

[26] I am of the considered view that a preference or an opinion of what would be a "fair amount" for an award of damages which is not in sync with the trial judge's award of damages could not be a ground for an appellate court to reverse the trial judge's decision for the award of damages granted.

H **[27]** An appellate court should only entertain an appeal where the appeal is premised on the principles of law for an appeal against the award of damages. It should not be based on what is or is not fair to the party who has appealed against the decision of the trial judge.

I **[28]** After having meticulously scrutinised through the submission of the defendant's counsel, I found no reason to disturb the SCJ's decision based on the principles of law enunciated by the decisions of the Federal Court. Allow me to reiterate the words of Lord Evershed MR in *Wilson v. Pillay*

(*supra*) where His Lordship said: "... the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one".

Conclusion

[29] Based on the above reasoning, I dismissed the defendant's appeal and ordered the defendant to pay costs of RM3,000 to the plaintiff.